

"to make their protests in language appropriate to their sense of occasion." Otherwise, free speech would not have "the same value to them as it has to a member of the bourgeois establishment." By making the distribution of power more unequal, censorship of Marxist publications would damage democracy.

This argument demonstrates, Dworkin believes, that questions of procedure cannot be decided without regard to "substantive political questions." The Supreme Court cannot take refuge in procedural arguments based on "the intention of the framers"; it is bound to make "important political decisions." As long as judges confine themselves to deciding whether the stipulated procedures have been observed they will merely be maintaining the existing distribution of power. Only by making political decisions can the court call "some issues from the battleground of power politics to the forum of principle." And that is where the hope for the future lies, because it promises

that the deepest, most fundamental conflicts between individual and society will once, someplace finally become questions of justice. . . . I call it law.

It has, of course, been recognized since ancient times that the purpose of constitutions is to distribute power by deciding who is qualified to vote and to hold office. But the point of such stipulations is to make it possible to translate all future disputes into issues about procedure, that is to say, into disputes about whether the law has been observed. In Dworkin's world that appears to be impossible. His theory of interpretation presupposes that all human utterances are instruments for obtaining satisfactions or power, what is called the "ideological view of language." Achieving greater power is also the only objective that Dworkin considers in his discussion of procedure. And certainly if, as he insists, the principle of equal concern and respect encapsulates all of morality, then human life is nothing but a struggle for power. Neither the aspirations served by the traditional idea of law nor the rational capacities that have enabled the rule of law to flourish appear to have impressed Dworkin. He has reduced law to an instrument for redistributing power.

He would have us believe that his theory rests on indisputable "moral facts." Unfortunately, his fundamental moral principle is either empty or highly disputable, and he connects law with morality only by rejecting the logical distinction between "is" and "ought." Instead of giving law a moral dimension by repudiating that distinc-

tion, the rights theory makes it impossible to tell an authentic legal decision from an arbitrary exercise of power. It allows, indeed obliges, judges to ignore the law in order to satisfy the wants of minorities. And this undoubtedly justifies Dworkin's claim that his theory corrects "the majoritarian bias of democracy."

But a secret is concealed in the thicket of Dworkin's prose—that "the majoritarian bias" is corrected by

enabling minorities, who cannot persuade their fellow citizens to agree with them, nevertheless to impose their will. In short, if Dworkin's rights theory were to triumph over "the rule book," minorities who now fail to get their way by constitutional means would be given the power to do as they please. Whether the lucky minorities would be rapists, vegetarians, or Communists remains somewhat unclear. But no one is likely to be troubled by liberty. □

## VIGILANTE: THE BACKLASH AGAINST CRIME IN AMERICA

William Tucker/Stein and Day/\$16.95

Mary Mainland

Recent polls indicate that in November 1986, for the first time in the state's history, California voters are likely to remove from office a justice of the state Supreme Court. Four of the five justices who constitute the court's liberal majority will be on the ballot for reconfirmation and all four are encountering vigorous opposition. Most clearly in trouble is Chief Justice Rose Bird, with one poll showing that only 28 percent of the electorate supports her.

Despite overwhelming passage by the voters in 1978 of a death penalty initiative, there have been no executions in the state since 1967, and Bird has become the chief symbol of the court's consistent refusal to permit any. In the almost forty capital cases she has considered during her eight years on the court, not once has she voted to affirm the death penalty. She claims she would do so in a "constitutionally proper" case, but the likelihood that such a case will be among the more than 160 death penalty appeals pending seems remote. No matter how heinous the murder or how blatantly guilty the defendant, Bird has always found some evidentiary error or prejudicial jury instruction to justify reversal of the penalty, if not the conviction.

The defensive tack taken by Bird and her supporters is to portray the court's liberal majority as the beleaguered defenders of the Constitution, courageously resisting an opposition motivated by the desire to "politicize" the court. In a recent interview, Bird accused her opponents of wanting a chief justice "who would pass all their litmus

tests," and declared, "My role isn't to be popular. My role is to be just and follow the law."

*Vigilante* should help stiffen the public's resistance to such moral bullying. Written in an anecdotal, journalistic style, its argument against the judicial philosophy exemplified by the U.S. Supreme Court under Warren and today by Bird and her liberal colleagues is fundamentally a moral one. William Tucker contends the public has a right to expect courts to reinforce people's sense of right and wrong; a justice system that fails to do so encourages those with criminal tendencies and demoralizes the law-abiding majority. He usefully reminds readers that vigilantism has historically arisen when law enforcement was nonexistent, incompetent, or corrupt, leaving the public little choice but to take the law into its own hands. The book's title, however, is misleading. As Tucker points out, there is little evidence that vigilantism is currently either a widespread or a growing phenomenon; even the so-called "subway vigilante," Bernhard Goetz, did not fit the definition: He did not seek out the four youths he shot; they accosted him.

Tucker persuasively argues that the Warren Court's emphasis on the rights of criminal defendants and its disregard for the consequences to law enforcement, and, therefore, to the general public, contributed substantially to the soaring crime rate between 1963 and 1980. Decisions such as *Miranda* and *Mapp*, the 1960 case that made the exclusionary rule applicable to state prosecutions, made it more difficult and more costly to convict the

guilty; the focus shifted from the guilt or innocence of the defendant to whether the police had played by the rules. To a large extent, the costs have remained hidden. For example, relatively few cases are thrown out on search and seizure grounds, but the uncertainty created by the confusing and changing rules enunciated by the courts has increased the plea bargaining of felonies down to lesser charges, carrying lighter sentences.

Yet Tucker is careful not to overstate the case against the courts, identifying other influences at work in the sixties. Sociologically oriented criminologists espoused the view that criminals were sufficiently "different" that they could not be deterred by the threat of punishment. Freudian psychotherapists, most notably Karl Menninger, argued that criminals were "ill" and that punishment was therefore a crime. Rehabilitation and treatment came into vogue; punishment and individual responsibility fell into disfavor. The prison population decreased and court decisions effectively abolished the death penalty.

As the price paid by offenders for their conduct diminished, the effects that economic theory would predict appeared. In a stunning reversal of its steady decline between 1940 and 1960, the crime rate began a spectacular rise in 1963. Although it peaked in 1980 and has since inched downward, the incidence of violent crime is today two-and-a-half times what it was in 1960, and property crimes have almost tripled. Moreover, the nature of crime has changed in such a way as to heighten the public's sense of insecurity: Not only is it more brutal, it seems more senseless and random. In the 1960s, 90 percent of killers were known to their victims; today 30 percent of murders are "stranger" killings. Similarly, two-thirds of rapists are completely unknown to their victims, when in 1967 only about half were.

Tucker cannot conclusively prove a causal connection between the rise in crime and the judicial and social trends of the sixties, but he offers some compelling evidence. Much of it will be familiar to those who have read political scientist James Q. Wilson and the work of economists and legal theorists associated with the University of Chicago school of economics. He shows, for example, that such currently popular explanations for the crime rate as demographic changes or poverty are inadequate. Although most crimes are committed by males between the ages of 15 and 24, the rise in the crime rate between 1963 and 1980, particularly of violent crimes, far outstripped the increase in the population within that

age bracket. At the same time, unemployment and the percentage of the population that was poor both declined.

In one of his most perceptive chapters, Tucker does much to discredit the notion that the death penalty does not deter crime. Although its deterrent effect is difficult to prove statistically, the drastic increase in "stranger" murders offers strongly suggestive evidence. These murders usually occur in the course of other crimes, such as armed robbery and rape, that already carry stiff sentences; in the case of rape, they may even exceed those for some degrees of homicide. As Tucker points out, in the absence of a death penalty, the additional risks attached to killing one's victim are not that great, and the criminal stands to gain by eliminating a principal witness against him. The public, if not the California Supreme Court, seems convinced by the evidence: Approval of the death penalty rose from only 45 percent in 1968 to 75 percent today.

By contrast, the idea that society knows how to rehabilitate criminals has been thoroughly discredited. None of the highly touted rehabilitative methods has proved successful, and one study indicates that psychoanalysis may even increase recidivism.

In retrospect, it is the hubris of liberal jurists and social theorists that seems most striking. They downgraded the importance of punishment and denigrated traditional views of personal responsibility, without having any empirical basis for the belief that they could reduce the incidence of criminal behavior by rehabilitation or psychotherapy. In its zeal to curb police abuse, the Warren Court rendered decisions that could not help but impede law enforcement to some degree, even though there seems to have been no systematic evidence of the extent of police misconduct. Well-intentioned liberals overlooked the fact that those most in need of effective law enforcement are the poor, who are disproportionately the victims of crime and cannot afford to hire private security guards. Residents of high-crime, low-income neighborhoods tend to suffer the most when "the criminal goes free because the constable has blundered." In an earlier era, judges recognized the inequity of such a result; a more "enlightened" succeeding generation of judges self-righteously declared that it was necessary for the enforcement of constitutional rights.

*Vigilante* has both the virtues and defects of its nonscholarly genre. Occasionally, Tucker's speculations outstrip the available evidence, as in his discussion of the effects on future

criminal behavior of an absent or uninvolved father. Critics are likely to seize on such minor lapses as the mistaken attribution to present U.S. Supreme Court Justice John Paul Stevens of former Justice Potter Stewart's famous dictum about pornography, "I may not be able to define it, but I know it when I see it." On the whole, however, the book gives a balanced appraisal of trends in criminal justice during the last

two decades, and introduces the general reader to some of the best literature in the field. Its most important service is to undermine the claims to moral superiority and superior wisdom of liberal intellectual elites. Chief Justice Bird is unlikely to reconsider her views as to what justice entails, but the much maligned public may gain more confidence in its own judgment. □

## THE NEW DIRECTION IN AMERICAN POLITICS

Edited by John E. Chubb and Paul E. Peterson

Brookings Institution/\$26.95; \$9.95 paper

Gordon Jackson

What do heavyweight intellectuals of the liberal establishment make of Ronald Reagan? To what extent have his two landslide elections occasioned a reassessment of issues on the left—the sort of ideological repositioning Democratic politicians have been talking about the past few years?

Part of the answer can be found in *The New Direction in American Politics*, a collection of thirteen essays written under the auspices of the Brookings Institution, each dealing with a different aspect of the political landscape left in the wake of the Reagan electoral juggernaut. While Brookings makes its usual disavowal of partisanship, the conclusions of its writers, nine of whom are staff members and the other six academics (two of the articles are by co-authors), betray that clinical haughtiness toward Reaganism characteristic of liberal academia. The volume can, in other words, probably be taken as an effort by Ronald Reagan's critics to pin him down and dissect him.

They retreat from the task, however, into a bastion of proceduralism. No new directions of any substance are discerned. Rather, Reagan's successes are variously attributed to favorable workings of the business cycle, the South's belated embrace of the Republican party, Reagan's performance on television, the Republicans' financial advantage and superior party organization, politicization and centralization of the White House, a Republican bias in the electoral college, and deficit spending. Any real, live issues in there?

Not to speak of. Issues aren't what Reagan is about, as most of the con-

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tributors see it. The secrets of his success lie elsewhere. He has a winning personality. He is lucky—the business cycle, for example, happened to be on an upswing in 1984, as D. Roderick Kiewit and Douglas Rivers point out, their thesis being that one need look no further than the business cycle to predict the outcome of presidential elections. Reagan is, simply, an effective tactician—he knows how to play to a TV camera, how to work Congress, how to raise money.

There is nothing he does that his opponents could not learn to do as well. An unspoken message always comes through the jargon: "Rest easy; he'll go away soon, and we can learn from his methods." The wounds of 1980 and 1984 are soothed in the balm of an Elizabeth Drew observation—quoted disapprovingly by Kiewit and Rivers but actually a fair summation of the volume's theme—that Reagan's electoral success was "above all a testimonial to the man as a political phenomenon."

Now, it should be mentioned that the introductory essay, by the book's editors, John E. Chubb and Paul E. Peterson, takes a slightly different position. They credit Reagan with already having accomplished significant political realignment. They too take little account of the President's issues, but for his political skills they hold an almost reverential awe. Giving him more credit for policy victories than conservatives do, they suggest that he has all but dismantled the welfare state, presided over an immense military buildup, and dramatically altered the terms of discussion in Washington. One suspects these gentlemen of performing the prudential function of

turning up the alarm bell as counterpoint to the sanguinity of their colleagues.

Whatever their purpose, they come a little closer than their colleagues to viewing Reaganism as conservatives understand it—a triumph of ideas. Chubb, Peterson, et al. need to grapple with the proposition that between about 1964 and 1978 most Americans came to believe certain things about the federal government: that it was undertaking more than it ought to be, claiming too large a share of the nation's resources, eroding the autonomy of individuals, states, and municipalities, principally through the courts, and threatening national security with a feckless reluctance to keep pace militarily with the Soviets.

From these broad axioms have flowed a host of issues that have determined every presidential election since 1968. When the Wallace vote of '68 is added to Nixon's total, it makes four conservative landslides in the five elections. The single exception, Jimmy Carter, ran as a social conservative, a virtual walking morality play.

All these elections were about ideas. About the time Barry Goldwater was going down to a bitter defeat, William Buckley and the early *National Review* writers, having wed economic libertarianism to Burkean traditionalism, were nailing down the theoretical case for conservatism. In the seventies their arguments were conveyed with superb style by an array of opinion journalists unmatched on the left. That decade also saw the discrediting of Keynesianism, and the introduction to Congress by supply-siders of an idea novel to Capitol Hill—wealth has to be created before it can be redistributed. The neoconservatives signed on to lend the movement a bit of academic respectability and to lead the charge on a host of new issues, such as racial quotas, raised by a liberalism gone berserk.

Ronald Reagan rode into office on this tidal wave of ideas, of words that register with deep, gut-level meaning for voters. People vote for or against these ideas; they have been for years, and probably will into the next century.

This, roughly, is the conservative catechism regarding the Reagan phenomenon. Among the Brookings crowd it all gets summed up by the phrase "a highly ideological President"—one small factor among many to be included in the model and fed into the computer. They've got Reagan categorized, put into historical perspective, and rendered innocuous. But the realism they imagine themselves to be practicing explains very little.

Perhaps conservatives are just still